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IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, ET AL.,

Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC., BRIDGESTONE CORPORATION AND FORD MOTOR COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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This case, challenging Ford and Firestone's sale of defective Explorers and tires, represents the most significant consumer class action to come before this Court in at least a decade. Each class member has essentially the same case about the same products; but for the claims' small value, these would confront courts across the country with the exact same inquiry. Although Respondents seek to introduce extraneous matters, some of which might be germane to personal injury actions sounding in tort, this case really presents two overriding questions: First, can a nationwide class action ever be brought against a manufacturer who nationally marketed a product it knew to be defective and whose "conduct . . . was uniform across the nation," Pet. App.3a? Second, may a federal court reject state-created contract and consumer protection claims in favor of tort-only recovery, and use this newly-minted federal common law as a basis to deny class certification? Each of these questions has tremendous national import and reveals a decisive split between the Seventh Circuit and other Courts of Appeals.

1. The Circuits are Divided on the How to Determine Whether Common Questions of Law Predominate.

a. Respondents fail utterly to come to terms with the clear division among the Circuits on the appropriate method for determining whether common questions of law predominate in a class action in which more than one state's law will apply.

First, Respondents argue that there is no conflict by pretending that the court below actually engaged in the detailed examination of variations among states' laws that they concede the Third, Fifth, Ninth and D.C. Circuits require. Thus, Respondent Bridgestone/Firestone ("Firestone") says that the court below "assessed the relevant law," and "perform[ed] the evaluation" called for by *Walsh v. Ford Motor Co.*, 807 F. 2d 1000 (D.C. Cir.), cert. denied, 482 U.S. 915 (1987), *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011 (9th Cir. 1998), *Castano v. American Tobacco Co.*, 84 F. 3d 734 (5th Cir. 1996), *In re Prudential Ins. Co.*, 148 F. 3d 283 (3d Cir.

1998), and the case all these others followed, *In re School Asbestos Litig.*, 789 F. 2d 996 (3d Cir. 1986), looking at "differences in state law" to see if a "creditable showing" could be made that the relevant laws could be grouped into a small number of patterns. Firestone Brief in Opposition ("Fst. Opp.") 10-13. Respondent Ford takes the same tack, claiming the court "*did* conduct such an analysis." Ford Opposition ("Ford Opp.") 16.

But the opinion below does not support this fanciful reading. As Respondents elsewhere concede "[t]he court did not definitively determine any particular state's law relating to plaintiffs' claims." Fst. Opp. 18-19; see also Ford Opp. 9.

The Court of Appeals instead announced a rule that "[n]o class action is proper unless all litigants are governed by the same legal rules," Pet. App. 3, and decertified both classes with respect to all of Petitioners' causes of action – express warranty, implied warranty, consumer protection, and unjust enrichment – on the undifferentiated assertion that "state laws about [them] differ." Id. at 9a. This blanket holding replaces the predominance requirement with a "uniformity" requirement and would prohibit class actions whenever choice of law rules make multiple states' laws applicable. Pet. 14-18. It conflicts directly with at least four separate Circuit holdings, as well as the Fourth Circuit's determination that courts facing multistate class actions should look to the *School Asbestos* methodology. See *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993).

Ford urges that the Court of Appeals should not be taken "*literally*." Ford Opp. at 13 (emphasis in original). Firestone says the rule is not "the essence" of what the court below held. Fst. Opp. at 10. But this is what the Court of Appeals said and held, and the uniformity requirement it invented and imposed is already being applied by lower courts in the Seventh Circuit. See, e.g., *In re Trans Union Corp. Privacy Litig.*, 2002 U.S. Dist. LEXIS 17209, at *40 (N.D. Ill. September 10, 2002).

By contrast, what would have been required in the other

Circuits cited in the Petition is, as Justice Ginsburg jointly wrote when sitting on the D.C. Circuit:

> A considered predomination determination . . . The issue can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines.

Walsh, 807 F.2d at 1017 (internal quotation marks and citations omitted); see also, *e.g.*, *Castano*, 84 F. 3d at 742-743 ("extensive" review of state law variations is required).

Second, and alternatively, Ford now clumsily argues that the *district* court engaged in the proper analysis. Ford Opp. 1, 16. The record is to the contrary. All the district court ever said about the differences in state law was that the state laws relating to all of the causes of action in the complaint – including those dismissed in the same opinion – varied sufficiently as a general matter that the court had to engage in a choice of law analysis. Ford Opp. App. 4a; see Fst. Opp. 8. Thereafter concluding that only the law of Michigan and Tennessee would apply, it also said that it followed from the fact that only two states' laws would apply that common issues of law predominated, Pet. App. 40a n.17.[1] The district court, though, did *not* conclude the obverse – that common issues would not predominate if the laws of multiple states applied. Cf. Ford Opp. 7. Its choice of law decision obviated the need for any analysis of relevant distinctions among the laws of the various states.[2]

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[1]It concluded, too, that it would not have to subclass based on applicable state laws because of its choice of law ruling. Pet. App. 67a n. 45.

[2]The issue at this certiorari stage is not what the outcome would be of the extensive analysis of state law variations required by other Circuits, but whether there is a conflict about the legal standard for deciding whether a class can be certified in cases where different state's laws will be applied. In this precise context, as *Walsh* and other courts suggest, the

b. Somewhat inconsistent with their claim that the court below did what other Courts of Appeals would have, Respondents also attempt to distinguish the cases on which Petitioners rely. Ford Opp. 15-17. This effort cannot succeed.

First, in *School Asbestos*, the Third Circuit upheld certification of a nationwide litigation class, despite the applicability of the laws of different states. All Respondents say about this direct conflict is that *School Asbestos* is "discredited" or has "lost all weight as authority." Ford Opp. 17 n. 7. There is no basis for this assertion. See, e.g., *Prudential*, 148 F. 3d at 315 (relying on and applying *School Asbestos*); *Castano*, 84 F. 3d at 742 (relying on and applying "[t]he able opinion in *School Asbestos*").

Respondents next weakly suggest that *Walsh* and *Castano* do not conflict with the decision below because they "reversed" certification. Ford Opp. 15; see also Fst. Opp. 11. *Walsh* actually remanded for application of the appropriate standard, 807 F. 2d at 1019; *Castano* specifically adopted the *School Asbestos* standard for predominance, but did not remand because of an "independent" finding that certification

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analysis of variations in state law must be undertaken in the first instance by the district court. But regardless, where, as in this case, there is a Circuit split about a legal standard and the correct legal standard was never applied below nor the evidence pertinent to it considered, this Court routinely grants certiorari, ultimately remanding for the lower courts to determine the legal question under the proper standard in the first instance. *E.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 237-239 (1995).

Moreover, given the minor variations in applicable state law, common issues of law would be held to predominate under the approach taken in other Circuits. See Pet. 18-19 n.11. The state laws at issue here fall into just a few patterns. The Court of Appeals decertified as to *all* of Petitioners' causes of action. Respondents cannot show significant variation as to even one, let alone – what they would have been required to do in other Circuits to obtain decertification – all four. To take just one obvious example, with respect to implied warranty law, even Respondents argue only that some states require privity. See Fst. Opp. 9 n. 7; see also Ford Opp. App. 100a-105a (only relevant difference listed is privity). As the district court noted, this is a straightforward distinction that may be easily managed through subclasses. See Pet. 7.

was not "superior," in part because the high value of each smoker's tort suit rendered individual litigation a strong alternative. 84 F. 3d at 746, 748. In any event, there is a clear conflict between the standards applied in those cases and by the court below.

Finally, Respondents attempt to distinguish *Prudential* and *Hanlon*, in which the Third and Ninth Circuits certified multi-state law nationwide classes, as "not comparable" because they involved settlement rather than litigation classes. Ford Opp. 16; see also Fst. Opp. 11. But this Court has held that the predominance inquiry is unaffected by any distinction between settlement and litigation classes, since it involves "questions that pre-exist any settlement." *Amchem*, 521 U.S. at 623. And both the Ninth and Third Circuits explicitly stated that their rulings were not dependent on settlement considerations. See *Hanlon*, 150 F. 3d at 1020, 1022, 1025 (court's conclusion "independent of settlement considerations"); *Prudential*, 148 F. 3d at 314 (holding, under *Amchem*, "potential benefits of settlement are [not] relevant to the predominance inquiry.").[3]

2. No Factual Differences Required Decertification of Both Classes on All Causes of Action.

a. Firestone alone urges that, because of factual differences among class members' claims, certification would have been inappropriate here even if the court below had taken the proper

[3]Respondents argue, irrelevantly, that the decision below is "consistent" with others denying certification of nationwide classes, Fst. Opp.14-17. It has never been Petitioners' position, though, that nationwide class actions involving the laws of different states must always be certified. Our point is rather that in other Circuits, as Respondents concede, a detailed evaluation of variations among the relevant state laws is required under Rule 23 to determine *whether* a class action involving more than one state's law should be certified. Nor does the denial of certiorari in the cases cited by Firestone, id. 14, have any bearing here. For example, the decision in *Sikes v. AT&T*, 281 F. 3d 1350, 1367 (11th Cir.), cert. denied, 123 S. Ct. 117 (2002), rested on "plaintiffs' difficulties in showing injury and damages as a class," and did not implicate the predominance and superiority issues raised here.

approach to examining variations in applicable state laws, and that certiorari should thus "await a more appropriate case." Fst. Opp. 27. It is in error.

The holding that certification required uniform law did not depend on any underlying finding of fact, and Firestone does not urge that Petitioners' claim of error depends on a challenge to a fact found below. It makes the narrower claim that even if this Court were to reverse on the predominance of common questions of law, "the case could not proceed as a class action because individual issues of fact predominate." Id. at 27. But neither the facts found by the district court nor any conclusion about the facts drawn by the Court of Appeals – with respect to either of the certified classes, let alone both – has any implications for the propriety of certiorari.[4]

The district court's findings of fact – left undisturbed by the Court of Appeals – simply cannot support a conclusion that individual issues of fact predominate with respect to either the Explorer class or the tire class. The district court found, contrary to the position of Respondents, Fst. Opp. 25; Ford Opp. 7, that the defects alleged would be amenable to "common proof." Pet. App. 40a-45a. As to the Explorers, the district court found as a fact that they were similar in all respects relevant to the surviving class claims. Pet. App. 42a-44a. The only relevant distinction, that between Explorers with allegedly defective Firestone tires and those without, was addressed through creation of a single subclass. Pet. App. 73a.

As to the tires at issue, the district court also found as a fact that they were similar in all respects relevant to the remaining claims, Pet. 5-6, addressing the minor variations among them with six subclasses. See Pet. 6; Pet. App. 79a-81a. This should be unsurprising: NHTSA for example, had

[4]Tellingly, Firestone does not even make this claim with respect to the Explorer class, and Ford makes a different and much narrower argument altogether, see infra 7-8. For Firestone's argument to have any purchase, Firestone would of course have to show that individual facts predominate with respect to *each* class and each of Petitioners' causes of action.

over 17 million of the tires at issue here recalled, finding that they all shared the same defect claimed in this case.

The Court of Appeals did assert that there were differences among tires and Explorers that, it surmised in dictum, would have defeated certification of "50 state classes." See Fst. Opp. 25-26 (relying on the court's assertion about the tires). This assertion, though, cannot make any difference to the propriety of review before this Court if there are not, *in reality*, factual differences relevant to the underlying claims.

There are not. The court's assertion of debilitating factual differences is fatally infected by its legal error: the court failed to apply the other Circuits' approach to assessing the predominance of common questions of law, which would have required, as its first step, an examination of the elements of each cause of action. See Pet. 10-11, 19 n.11. As a consequence it articulated factual differences that are not relevant to the elements of the surviving class claims.

With respect to the Explorers, *all* of the purported factual differences the court described involve either the way in which the vehicles were used or differences in resale price. Pet. App 9a-10a. With respect to the tires, most of the claimed differences involve the way they were used. Pet. App. 10a.

But these issues are irrelevant to the consumer claims in this case. The theory behind all of Petitioners' causes of action is that, because of concealed defects, Respondents' products were worth less than Petitioners paid at the time of initial sale – something to which use or resale price is irrelevant. See Pet. 11. Because the court below failed to examine the elements of the causes of action actually asserted, its conclusions about factual commonality with respect to each class – like Firestone's, Fst. Opp. 26 – were based upon purported factual differences that are not relevant to the consumer claims presented in this case. Those conclusions therefore can have no bearing here.

b. Perhaps recognizing this, Ford argues only that

Petitioners' failure "to seek review of" the question of factual commonality renders review inappropriate. Ford Opp. i, 12. Obviously, though, since the Court of Appeals' conclusions about factual differences are just a consequence of its legal errors, Petitioners need not separately "seek review" of those conclusions in order for this Court properly to grant review.

3. The Decision Below Violates Principles of Federalism.

The Court of Appeals used the "superiority" inquiry to give force to an economic legal theory of its own devising that a tort-only regime would provide the greatest societal benefit by fixing the appropriate levels of deterrence and compensation. Pet. 19-25. On the basis of that theory the court found, as Respondents acknowledge, not that individual litigation of class members' claims was "superior" to class certification, but that NHTSA regulation and suit by persons not in the classes was superior to *any* adjudication in *any* forum of the class claims, which the court derided as brought by "uninjured buyers." Fst. Opp. 20. State laws provide that those who get less than they pay for because of concealed conditions in products they purchase are injured and entitled to redress. The court's refusal to apply those laws violates *Erie* and conflicts with other Circuits, which do not read the "superiority" requirement in this novel way. Pet. 24-25.

Respondents don't even address this argument, suggesting Petitioners' complaint is merely with the court's conclusion that most states don't permit recovery for economic loss claims absent physical injury.[5] The *Erie* point, though, is that

[5]Respondents and the court below do wildly mischaracterize state law. See Pet. 20-23. None of the Courts of Appeals and highest state courts they both cite, see Fst. Opp. 19-20 n. 15, rejected a contract or consumer protection claim for benefit-of-the-bargain damages because of an absence of physical injury or a lack of "manifestation" of the value-decreasing defect. See Pet. 22-23 n. 14. State law does not adopt Firestone's frightening suggestion that defective tires are worth the price paid because less than one percent have failed and the rest have so far "function[ed] without incident for thousands of miles." Fst. Opp. 20 n. 16. Firestone's argument is really that its products should not be found defective, e.g., Fst.

the court below foreclosed the litigation of viable state law claims here based on its own economic model of how substantive law should be designed. In our federal system, to decide on the basis of such a federal common law principle not to let these claims proceed goes beyond the power of the federal court. See *Erie v. Tompkins*, 304 U.S. 64, 78 (1938).

The court below did not even claim that *no* states permit no-physical-injury recovery in contract or consumer protection. See Pet. App. 7a (grudgingly acknowledging that a "minority" of states do). Yet it held that, though such claims exist under state law, it would be "superior" for any such viable claims *not* to be litigated, in favor of "[r]egulation by the NHTSA coupled with tort litigation by persons suffering physical injury." Pet. App. 11a. In arrogating to itself the power to judge the wisdom of state lawmakers who created these causes of action, the court violated *Erie*. Adjudication of state law claims in federal court "does not carry with it the generation of rules of substantive law." *Gasperini v. Center for Humanities*, 518 U.S. 415, 426 (1996).

4. The Superiority Determination Turned on the Claims' Small Value.

Contrary to Respondents' assertion, Ford Opp. 20-22, Fst. Opp. 22, the Court of Appeals' decision did use the fact of the small value of Petitioners' claims – most seek no more than several hundred dollars – and the consequence that they would not be litigated individually in finding that class certification would not be superior. The court did not hold that individual litigation by class members for economic loss would be preferable to certifying a class, but that NHTSA regulation and tort suits for physical injury by persons *outside* the class together would be.[6] In other words, the low value of the

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Opp. 20 n. 15, a merits argument irrelevant to class certification.

[6]NHTSA's focus is not on compensation for purchasers of defective products, see Ford Opp. 8 n. 3, and in its October, 2001, report, NHTSA specifically disclaimed any responsibility for finding liability or assessing damages. See http://www.nhtsa.dot.gov/hot/Firestone/firestonereport.pdf

individual claims – i.e., the unlikelihood that they would be brought – was necessary to the court's conclusion that it would be "superior" to decertify the class. This ruling conflicts with this Court's teaching and the decisions of other Circuits where small value weighs in favor of superiority. See Pet. 25-27.[7]

5. There is a Division on the Meaning of Efficiency.

Finally, Respondents attempt to avoid the Circuit conflict about the meaning of the word "efficient" in Rule 23. For the court below, the "efficiency" requirement in the Rule calls for the creation of a market of judgments in individual cases in order to guide settlement, rather than a determination of the method of adjudication that will best conserve judicial and litigant resources, even where the other Rule 23 criteria are met. See Pet. App. 11a-12a. Ford's halfhearted attempt to recast the lower court's holding is obviously wrong; it did not merely hold that efficiency could not justify certification where the "commonality" requirement is not met. See Ford Opp. 10, 11, 23-25.[8] The court ruled on the *meaning* of the word "efficient" to which the Rule, by its terms, is keyed and as to which Courts of Appeals – including the Third, Fifth, Sixth, and Ninth – have now expressed conflicting views. Pet. 27-30. As similarly expressed by the Fourth Circuit, other Circuits understand the efficiency inquiry to ask whether "the class mechanism may advance this action and reduce the need for repetitive litigation in this area." *Central Wesleyan,* 6 F.3d at 180. Respondents do not even attempt to address the conflict. Ford Opp. 25 n. 9.

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at 6. Nor, as Ford claims, Ford Opp. at 3-4 n. 1, has NHTSA rejected "the types of allegations" made against Ford in the Complaint, having merely decided against an investigation of one limited aspect of Explorer design.

[7]Petitioners of course do not argue that the small value of claims warrants overlooking, ignoring or bending the requirements of Rule 23. See Ford Opp. 21-22; Fst. Opp. 23.

[8]Nor was its efficiency ruling based on requirements of federalism, Ford Opp. 23-24. See Pet App. 7a, 12a (federalism references relating only to application of what the court concluded was the correct Indiana choice of law rule).

Respectfully submitted,

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